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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-2205

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

Petitioner,

vs.

TONI MURRAY,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner premises his argument for certiorari on the mistaken assumption that all section 1983 suits against court clerks should be dismissed on the ground of absolute immunity regardless of the manner in which any particular clerk is shown at trial to have violated a citizen's constitutional rights. Should Respondent, however, prove in a trial of this cause that Petitioner wilfully or recklessly failed to carry out the court's ministerial order to recall her arrest warrant, any possible rationale for according absolute immunity would be far different from a case in which a court clerk's constitutional violation resulted from his negligent exercise of discretion. Indeed, immunity for a clerk who deliberately or recklessly fails to carry out a judicially ordered ministerial duty would be irreconcilable with any previously stated rationale for according quasi-judicial immunity. See McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972). In its present pre-trial posture this case is thus an inappropriate vehicle for deciding the appropriate level of immunity for court clerks since the pleadings would allow Respondent to prove at trial conduct by Petitioner that would make the grant of immunity wholly unwarranted.

Supreme Court review of this case is unwarranted not only because of its premature posture, but also because the submitted issue of whether state court

clerks are entitled to absolute immunity has been for all practical purposes settled by this Court's recent decisions elaborating the standards for granting such immunity in section 1983 cases. The division among the circuit and district courts on this issue arises from cases decided before this Court clarified the standards for granting immunity in Butz v. Economu, 438 U.S. 478 (1978), Owen v. City of Independence, 445 U.S. 622 (1980), and Dennis v. Sparks, 101 S.Ct. 183 (1981). These cases mandate consideration of two criteria for granting absolute immunity: first, whether the immunity was well established at common law in 1871 when section 1983 was enacted, and second, whether the rationale for the immunity is compatible with the purposes of section 1983. Neither criterion is met with regard to court clerks who violate citizens' constitutional rights.

First, the pre-1871 case law is unanimous in recognizing court clerks' liability in damages for injuries resulting from the misfeasance of their ministerial duties. See e.g. State v. Merritt, 65 N.C. 558 (1871); Clark v. Wilcox, 31 Tex. 322 (1868); Lick v. Madden, 36 Cal. 208 (1868); Pass v. Dibrell, 16 Tenn. (8 Yer.) 470 (1835); See generally, 11 C.J. Clerks of Courts §86 ("Where a clerk of court fails or refuses to perform, or is negligent in the performance of, a duty imposed on him by law... and, if his act was the direct and proximate cause of the resultant injury, without contributory negligence on the part of the party complaining, the clerk is liable in damages therefor both personally and on his official bond." Id. at 892) (footnotes omitted).

Furthermore, immunizing court clerks from damages would be incompatible with the express motivation of Congress in enacting Section 1 of the Civil Rights Act of 1871. As this Court recognized in Mitchum v. Foster, 407 U.S. 225, 240 (1972), one of the major purposes of the Act's proponents was to provide a federal remedy for the violations of freedmen's and their sympathizers' constitutional rights by state court officials. See also statements of Sen. Osborn, Cong. Globe, 42d Cong. 1st Sess., 653 (1871); Rep. Platt, Id. App. at 186; Rep. Rainey, Id. at 394. It is thus not possible

in this case "to infer from legislative silence a congressional intention to abrogate immunities that were both 'well established at common law' and compatible with the purposes of the Civil Rights Act." Gomez v. Toledo, 446 U.S. 635, 639 (1980), quoting Owen v. City of Independence, 445 U.S. 622, 638 (1980).

Absolute immunity for court clerks also can not be justified under either of the two policy reasons this Court has heretofore stated as necessary grounds for according such immunity. First, the policy of promoting officials' fearless and principled exercise of discretion in the discharge of their duties, see Pierson v. Ray, 386 U.S. 547, 554 (1967), and Ferri v. Ackerman, 444 U.S. 193, 203-04 (1981), obviously does not apply to the non-discretionary discharge of ministerial duties. Indeed, as Judge Swygert pointed out in his concurring opinion in this case, Petition at 6a-7a, the better rule recognizes no immunity of any kind for court clerks who violate citizens' constitutional rights through misfeasance of their ministerial duties.

The lack of an absolute immunity defense for court clerks' misfeasance of ministerial duties is further emphasized by this Court's insistence in Dennis v. Sparks, 101 S.Ct. 183 (1981), Stump v. Sparkman, 435 U.S. 349 (1978) and Gravel v. United States, 408 U.S. 606 (1972), that the function actually performed by officials, and not their status or position in government, determines their entitlement to absolute immunity. The court clerk's activity in question in this case, that of assuring the transmittal to the police of the court's arrest warrant recall order, can in no sense be deemed the performance of a judicial act.

Second, the justification for absolute immunity from damages depends upon the existence of alternative safeguards that are adequate to protect plaintiff's constitutional rights. Butz v. Economu, 438 U.S. 478, 512 (1978). Since the failures of court clerks to carry out their ministerial duties do not normally occur as part of adversarial proceedings that are subject to review by impartial higher authorities, the harm from such misfeasance is invariably inflicted without any chance for remediation outside of an action for damages. In this case Respondent has only damages as a remedy for her arrest, imprisonment and strip search, all of which resulted from Petitioner's unconstitutional failure to transmit the order recalling

her arrest warrant. Acceptance by this Court of Petitioner's claim of blanket immunity for state court clerks would thus make such officials wholly unaccountable for their violations of federally protected rights through misfeasance of their ministerial duties. This result would not be compatible with this Court's often expressed understanding of the relationship between the purposes of the section 1983 damage remedy and the doctrine of absolute immunity.

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

John Elson
Attorney for Respondent

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339 East Chicago Avenue - Room 119
Chicago, Illinois 60611
Telephone (312) 649-8576

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Toni Murray, by her counsel, John Elson, Northwestern University Legal Clinic, asks leave to file the attached Response to Petition For A Writ of Certiorari in accordance with the provisions of Supreme Court Rule 46 for the filing of papers by persons proceeding in forma pauperis.

This Court directed Respondent to file a Response to the Petition by October 2, 1981. The undersigned counsel was appointed to represent Respondent in this cause by the United States Court of Appeals for the Seventh Circuit. The Court of Appeals also granted Respondent's Petition For Leave To File and To Proceed In Forma Pauperis. Said Order of the Court of Appeals is attached hereto as Exhibit A.

WHEREFORE, Respondent respectfully requests leave to continue proceeding in this cause in forma pauperis.

Respectfully submitted,

John Elson
Counsel for Respondent

John Elson
Northwestern University Legal Clinic
339 East Chicago Avenue - Room 119
Chicago, Illinois 60611
Tel: (312) 649-8576

EXHIBIT A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 30, 19 80

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. _____

Hon. _____

TONI MURRAY, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-1035 vs.	
CITY OF CHICAGO, et al., Defendants-Appellees.	No. 79-C-1176 Julius J. Hoffman, Judge

On consideration of the "PETITION FOR LEAVE TO FILE AND TO PROCEED IN FORMA PAUPERIS" and affidavit in support thereof filed herein on January 22, 1980 by the pro se plaintiff-appellant,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that Mr. John S. Elson, Northwestern University Legal Clinic, 360 E. Superior, Chicago, Illinois, 60611 be, and the same is hereby APPOINTED to represent the plaintiff-appellant herein.

IT IS ALSO FURTHER ORDERED that the following briefing schedule is hereby adopted:

1) The plaintiff-appellant's brief and appendix shall be due herein by March 11, 1980.

2) The defendants-appellees' brief shall be due herein by April 10, 1980.

3) The plaintiff-appellant's reply brief, if any, shall be due herein by April 24, 1980.

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PROOF OF SERVICE

John Elson, attorney for Respondent, certifies that he served the attached Motion For Leave To Proceed In Forma Pauperis and Response To Petition For Certiorari on counsel for Petitioner by placing the same in a postage prepaid envelope addressed to Joan Cherry, Assistant State's Attorney, 500 Richard J. Daley Center, Chicago, Illinois and placing said envelope in the United States mailbox at 339 East Chicago Avenue, Chicago, Illinois, before 5:00 p.m. on September 30, 1981.

John Elson

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Northwestern University Legal Clinic
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Tel: (312) 649-8576